IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~876~~ 70-27

ROBERT MITCHUM, d/b/a THE BOOK MART,

Appellant,

-vs-

CLINTON E. FOSTER, as Prosecuting Attorney of Bay County, Florida, M. J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, and THE HONORABLE W. L. FITZPATRICK, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida,

Appellees.

MOTION TO DISMISS OR AFFIRM

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CLINTON E. FOSTER, as
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W. L. FITZPATRICK, as
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County, Florida,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the question presented is so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This suit was instituted in the United States District Court, Northern District of Florida, by the filing of a complaint for preliminary injunction, permanent injunction, declaratory judgment, damages and convocation of a three-judge court. (Document No. 1) Plaintiff asked the federal court to restrain the defendants Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, and M. J. "Doc" Daffin, as Sheriff of Bay County, Florida, from enforcing the Florida obscenity statute (§847.011) and from enforcing two Florida nuisance statutes (§§823.05 and 60.05). It was plaintiff's contention that said statutes were being used by the defendants for suppressing certain materials protected under the First Amendment and that said statutes should be declared unconstitutional as written and/or as applied. Paragraph 8 of the complaint alleged that defendant Foster had filed a complaint in the circuit court of Bay County, Florida, asking the state circuit judge (W. L. Fitzpatrick) to issue a temporary injunction to enjoin the conducting of a nuisance at the business located at 19 Harrison Avenue, Panama City, Florida, known as the Book Mart. Plaintiff further alleged, in paragraph 9, that after a hearing in the state court, Judge Fitzpatrick had found that a nuisance existed and had issued a temporary injunction enjoining plaintiff's business; and a copy of that order was attached to the complaint. Paragraph 10

alleged that a stay of Judge Fitzpatrick's order had been sought in the First District Court of Appeal of Florida but that the court had denied the motion.

Plaintiff also sought declaratory relief, asking that a three-judge court be convened and to rule that Section 847.011, Florida Statutes, was unconstitutional.

The cause was heard by United States District Judge Winston Arnow who issued a temporary restraining order against the defendants, ordering them not to enforce or seek to enforce the temporary restraining order entered by Judge Fitzpatrick on April 6, 1970 "except to the extent such order prevents the sale . . . of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice." (Document No. 7)

On May 22, 1970, an order was filed designating a three-judge panel to hear the cause.

On June 3, 1970, plaintiff moved for leave to amend the complaint and to add as a party defendant Circuit Judge W. L. Fitzpatrick. (Document No. 13) The amended complaint alleged that Judge Fitzpatrick had entered an order seeking to hold the plaintiff in contempt for operating his business in violation of Judge Fitzpatrick's prior restraining order, which according to plaintiff was "clearly in conflict with" Judge Arnow's restraining order. (Document No. 13, p. 2)

Therefore, plaintiff asked Judge Arnow to enter an appropriate order "setting aside and vacating" (Id. at p. 3) Judge Fitzpatrick's order and that Judge Arnow further restrain Judge Fitzpatrick from taking any other action against plaintiff. Judge Arnow issued a temporary restraining order on June 5, 1970 and also granted plaintiff's motion to amend the complaint and add Judge Fitzpatrick as a party defendant. Judge Arnow stated in his order that:

> "On the facts before the Court, it is determined the principles of Dombrowski v. Pfister, 380 U. S. 479 (1965) and Sheridan v. Garrison, 415 F. 2d 699 (5 Cir. 1969), as well as principles enunciated in other and subsequent cases, including, among others, the reference to the question of contempt set forth in the case of Kingsley Books, Inc. v. Brown, 354 U.S. 436, 443 note 2 (1957), show there is here presented irreparable damage requiring the granting of the temporary order hereafter set forth and of such motion of plaintiff . . . ."
> (Document No. 17, page 2)

Judge Arnow thereupon restrained Judge Fitzpatrick from proceeding with a contempt hearing scheduled in the state court and also enjoined Judge Fitzpatrick from holding any other contempt hearing arising out of any alleged violation of the April 6, 1970 temporary injunction (Judge Fitzpatrick's order).

On June 8, 1970, this court issued its opinion in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970), and based upon that decision each of the defendants filed motions to vacate the temporary restraining orders.

These motions were argued before Judge Arnow on June 26, 1970. Before the court ruled, the plaintiff filed an amended complaint for temporary restraining order, preliminary injunction and permanent injunction. (Document No. 25) Included in said pleadings was a prayer that Judge Arnow hold Judge Fitzpatrick and the other defendants in contempt for violation of his June 5 restraining order. It was alleged that Judge Fitzpatrick had held a hearing and on June 25, 1970 had ruled that 80 of the 228 publications presented at the hearing were obscene; that he had ruled the operation of the Book Mart was damaging to the manners and morals of the people of the State of Florida and constituted a public nuisance causing irreparable harm; and that he had ratified and confirmed his April 6, 1970 order.

On July 8, 1970, Judge Arnow held another hearing on plaintiff's motions. At that hearing, defendants Fitzpatrick and Foster filed a motion to dismiss alleging, inter alia, that the court lacked jurisdiction because the plaintiff had taken appeals from both of Judge Fitzpatrick's prior orders (April 6 and June 25) to the First District Court of

Appeal of Florida and that plaintiff was actively litigating his federal claims in the state court. It was urged that by submitting his federal claims to the state courts, without reservation, plaintiff had deprived the United States District Court of jurisdiction subsequently to adjudicate those same claims in this suit; and as authority defendants cited this court's decision in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Attached to the motion were copies of the assignments of error which the plaintiff (Mitchum) had filed in the state court raising the federal claims therein. (Document No. 31)

Judge Arnow then ruled that the matter should be presented to a three-judge court and therefore he withheld ruling on all the pending motions except to grant plaintiff's motion to file a supplemental complaint.

Thereafter, the matter came on for hearing before the three-judge court. On July 22, the Court entered the order appealed, denying plaintiff's request for injunctive relief. The essence of the order was that since it was uncontroverted that the state court suit was "brought earlier in time and . . . the state court had assumed jurisdiction" before the federal suit had commenced, the federal court was without authority to enjoin the state court proceedings because of the bar of the anti-injunction statute, 28 USC, Section 2283. (Document 36) The court relied on the intervening decision of Atlantic Coast Line Railroad

Company v. Brotherhood of Locomotive Engineers, supra, in interpreting the provisions of the anti-injunction statute and said:

> "The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court."

QUESTIONS PRESENTED

POINT I

WHETHER THE COURT WAS CORRECT IN DENYING INJUNCTIVE RELIEF BECAUSE THE ANTI-INJUNCTION STATUTE PRECLUDED A STAY OF PREVIOUSLY INSTITUTED AND PENDING STATE COURT PROCEEDINGS.

POINT II

WHETHER THE COURT WAS CORRECT IN DENYING RELIEF FOR THE ADDITIONAL, UNSTATED, REASON THAT THE PRIOR SUBMISSION BY PLAINTIFF OF HIS FEDERAL CLAIMS TO THE STATE COURT, WITHOUT RESERVATION, DEPRIVED THE FEDERAL COURT OF JURISDICTION

SUBSEQUENTLY TO ADJUDICATE THOSE SAME CLAIMS.

ARGUMENT

POINT I

The Anti-Injunction Statute Bars a Stay

As shown in the statement of the case herein and the order appealed, it was uncontroverted that the state court proceedings had commenced before the appellant first sought relief in the federal court. State Judge Fitzpatrick issued the temporary injunction on April 6, 1970; the appellant filed his federal suit April 30, 1970; and Federal Judge Arnow issued his first restraining order on May 12, 1970. The effect of Judge Arnow's first temporary injunction, directed to the state prosecutor and Sheriff, was to prevent taking advantage of the order of the state court. This court has recognized that the bar of the anti-injunction statute cannot be circumvented by enjoining the parties from availing themselves of a state court order. Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U. S. 281, 287 (1970). The second injunction was directed, more pointedly, to the state judge himself and the proceedings in the state court.

Whatever doubt may have existed when Judge Arnow issued the order of June 5, this court's decision in Atlantic Coast

Line Railroad Company v. Brotherhood of Locomotive Engineers, supra, the following Monday (June 8) settled against the appellant the contention that Section 2283 of 28 U.S.C. is a statute of comity. Significantly, Judge Arnow cited Sheridan v. Garrison, 415 F. 2d 699 (5th Cir. 1969) in his June 5th restraining order. In Sheridan, the Fifth Circuit had held that the anti-injunction statute was not jurisdictional but was merely a rule of comity. In the Atlantic Coast Line case this court emphatically rejected that contention saying:

> "The respondent here has intimated that the Act [§ 2283] only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention."

Moreover, in Atlantic Coast Line, this court reaffirmed the principle that Section 2283 is a statement of legislative policy expressed in a "clear-cut prohibition qualified only by specifically designed exceptions [citation omitted] . . . and any injunction against the state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions" set forth in Section 2283. 398 U. S. at 287.

The three-judge court held that the relief sought as to the Florida state court proceedings would not come under any of the exceptions set forth in Section 2283.

The implicit holding of the court, therefore, was that an action under Section 1983 of Title 42, U. S. Code, (Civil Rights Act) is not an express exception to the anti-injunction statute.

This court has never expressed an opinion on this precise point. In Cameron v. Johnson, 390 U.S. 611, 613 n. 3 (1968) the court observed that the three-judge court below held that Section 1983 is not an exception to Section 2283 and said:

> "We find it unnecessary to resolve [that] . . . question and intimate no view whatever upon the correctness of the holding of the District Court.

However, in addition to the decision of the three-judge court in Cameron v. Johnson, 262 F. Supp. 873 (3-judge court, S. D. Miss. 1966) other federal courts have said that §1983 is not an express exception. E. g., Baines v. City of Danville, 337 F. 2d 579 (4 Cir. 1964); Hemsley v. Myers, 45 Fed. 283 (Cir. Court Kan. 1891); Brooks v. Briley, 274 F. Supp. 538 (3-judge court, M. D. Tenn. 1967), affirmed 391 U.S. 361; Sexton v. Barry, 223 F. 2d 220 (6th Cir. 1956). This issue is before this court again in

Samuels v. Mackell, Case No. 7, October Term 1970; and Fernandez v. Mackell, Case No. 9, October Term 1970.

In the absence of an explicit ruling, the three-judge court below was correct in interpreting Atlantic Coast Line as a harbinger of an inevitable decision by this court that §1983 is not an express exception to §2283. Any other result would dislodge the fundament of Atlantic Coast Line's rationale, and be irreconcilable with those portions of that opinion stating:

> "[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover, since the statutory prohibition against such injunctions in part rests upon the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 398 U.S. at 287 (Emphasis added)

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> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine

the controversy." Id. at 297.

Appellant nevertheless has argued that §1983 of 42 U.S.C. is an express exception because in that statute Congress conferred jurisdiction on the federal courts to adjudicate federal civil rights in a "suit in equity;" and that this general grant of equity jurisdiction, including within it injunctive power, constitutes "express" authorization to enjoin state court proceedings. Appellant relies on Landry v. Daley, 288 F. Supp. 200 (3-judge court, N.D. Ill. 1968) in which the court said (without citations of authority) that "an express exception has often-times been found by implication." Id. at 222. This reasoning is no longer tenable, since Atlantic Coast Line states that injunctions against state court proceedings "otherwise proper under general equitable principles" must be based on a specific statutory exception, and that those exceptions should not be enlarged by "loose statutory construction." 398 U.S. at 287. By fabricating an express exception from a grant of general equity jurisdiction, aided by "implication," the court in Landry failed two of the stringent tests of construction establish for §2283 by this court.

In addition, appellant urges that § 1983 should be an exception because of the federal nature of the rights sought to be protected. Again, this reasoning can be traced to Landry v. Daley, supra, and again this court's prior rulings militate against appellant's position.

In Amalgamated Clothing Workers of America v. Richman Bros., 348 U. S. 511 (1955), the court refused to find an exception to §2283, even though the federal court had exclusive jurisdiction over the subject matter of the dispute (labor case), and, as here, it was contended that the state court proceedings themselves were an obstacle to the enforcement of federal rights. This court said however:

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the 'gap' complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of §2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts

between state and federal courts." 348 U.S. at 518.

Accordingly, the fact that federal rights are involved does not justify enjoining the state court proceedings in which those rights are being litigated.

Particularly aggravating in this case is that appellant asked the federal district court to "vacate and set aside" the order of the state trial judge. Again, Atlantic Coast Line is pertinent because it points out that federal district courts do not have appellate jurisdiction over state courts. Only this federal court has the authority to review the legal correctness of a state court order.

The appellant contends here that it was necessary to seek injunctive relief in the federal court because the state trial court and state appellate court both denied his motions for a stay pending appeal. On this point, this court clearly spoke in Atlantic Coast Line saying (398 U.S. at 296):

> "Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because

> of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well. Cf. Natural Gas Co. v. Public Serv. Comm'n, 294 U. S. 698 (1935); United States v. Moscow Fire Ins. Co., 308 U. S. 542 (1939); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court §441 (R. Wolfson & P. Kurland ed., 1951). Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

Thus, the appellant could have sought review of the Florida state court decisions in this Court which, unlike federal district courts, possesses potential appellate jurisdiction.

Therefore, appellees urge that Section 1983 is not an express exception to Section 2283, and the lower court was correct in issuing its order denying injunctive relief in this case. Neither of the other

two exceptions (the "necessary in aid of jurisdiction," nor the "protect or effectuate judgment" exception) can be found here, and the lower court so held.

POINT II

The Federal Court lacked jurisdiction over the cause

Alternatively, the lower court was correct for a reason not specified in its order, but which was advanced in the motion to dismiss filed by appellees Foster and Fitzpatrick on July 8, 1970. (Document No. 31)

That motion attached as exhibits the notice of interlocutory appeal and assignments of error filed by Mitchum in the First District Court of Appeal of Florida. These appeals were from each of the two prior orders of Judge Fitzpatrick entered on April 6, 1970 and May 29, 1970. Both of those orders were the subject of the pleadings filed by Mitchum in the federal court. The assignments of error unmistakably show that Mitchum was litigating the same federal claims in both the state appellate court and the federal district court. As previously stated, the state litigation preceeded the filing of the federal suit and the litigation of the federal claims in the state court by Mitchum was without notice or reservation of federal claims. In this situation, the federal court lacked jurisdiction

under this court's decision of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 419 (1964) which held that:

> "[I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then--whether or not he seeks direct review of the state decision in this Court--he has elected to forego his right to return to the District Court."

Appellees thus contend that on the basis of England, supra, the denial of injunctive relief, as well as the ultimate dismissal of the action, was correct.

CONCLUSION

Appellees therefore contend that the decision of the three-judge court was clearly correct and this appeal should be dismissed or, in the alternative, the decision below affirmed without the necessity of further briefs or argument.

Respectfully submitted,

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